

urban center or another appears to be a matter of necessity to accomplish a complete division of the country rather than a decision based upon a strong commercial association with a single city.<sup>5/</sup> The Commission should provide flexibility in the PCS licensing process to allow areas, such as rural counties, to be disassociated from the MTAs and BTAs so as to allow local service providers an opportunity to purchase license rights for such areas.

4. The partitioning concept need not interfere with the Commission's plans to auction PCS license rights on the basis of MTAs and BTAs. It is reasonable to expect that two or more companies with interest in distinct portions of an MTA or BTA could form a bidding consortium with a plan to divide the market area in a manner permitted by the Commission. A successful consortium would detail the partitioning plan in its post-auction supplemental application, in like manner to the filing of settlement agreements by cellular tentative selectees for the RSAs.

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<sup>5/</sup> For example, Elko County, Nevada is a county of 17,135 square miles which is associated with the Reno, Nevada BTA (No. 372). However, the northeastern quarter of the county is more distant from Reno than it is from each of three other urban centers which form the core of three separate BTAs: Boise, Twin Falls and Salt Lake City. It is obvious fallacy to consider all of Elko County as a county most influenced for commercial purposes by Reno, and it is apparent that the system of grouping rural counties with a single urban center is based upon statistical averaging. A similar situation arises with many large rural counties. See, as further examples, Inyo County, California which is associated with the Los Angeles BTA, and Lincoln County, Montana which is associated with the Spokane, Washington BTA, despite vast separation from the city.

5. Partitioning could also occur after the issuance of an initial license. The Commission has a well established procedure for processing of "partial assignment of license" applications which allows a licensee to assign the license for a portion of its facilities. That procedure could be adapted to provide for assignment of the license rights to certain counties in an MTA or BTA, even if PCS facilities are not yet constructed in the area, thereby allowing the Commission to review the qualifications of the assignee and pass upon the partitioning plan. The Commission should accommodate such partial assignments as a means to expedite the availability of PCS throughout the MTA or BTA, and to further the opportunities of rural telephone companies, small businesses and minorities (i.e., the designated entities) for participation in the offering of PCS in a competitive bidding environment.<sup>5/</sup>

6. In the cellular marketplace, it has been shown that partitioning and separate responsibility for a discrete local market area has produced the desired results - service to that

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<sup>5/</sup> In the event the Commission adopts anti-trafficking rules applicable to PCS licenses acquired through competitive bidding, the parties to a partial assignment of license application should be permitted to demonstrate that the principal purpose of the sale is not for enrichment of the assignor. The parties could be required to disclose, for in camera inspection, the agreement covering the transaction and certify that the consideration for the area to be assigned is proportional to the price paid by the assignor for the rights to the entire area. Of course, if there are no anti-trafficking rules adopted or if the assignor's holding period for the license has passed, there would be no need for the Commission to review the financial aspects of the transaction.

area. Local licensees are uniquely responsible to the community or communities which they serve. In rural areas in particular, locally based telecommunications entities are service oriented and have an incentive to expand service as widely as possible within those communities. For PCS licensing as well, the public will benefit if the Commission allows for partitioning and separate licensing of areas within the MTAs and BTAs.

**II. The Commission Should Reconsider the Construction Requirements for PCS, but if Retained, the Licensees of Partitioned Areas Should Not be Prejudiced by a Failure of Construction in Another Partitioned Area**

7. In its Second R&O the Commission established construction (or coverage) requirements to ensure that PCS spectrum is utilized effectively. It required broadband PCS licensees to offer service to one-third of the population in a market area within five years, two-thirds within seven years, and ninety per cent within ten years.<sup>2/</sup> Petitioners have serious concerns about the practicality of enforcement of the current broadband PCS construction requirements. First, there is no objective standard for ascertaining the reliable service area of a PCS system. It appears that the new Section 99.206 of the rules is vague and unenforceable insofar as it requires a licensee to "...serve with a signal level sufficient to provide adequate service..." to given population

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<sup>2/</sup> See Second R&O at para. 134 and Section 99.206 of the rules.

levels at stated intervals of the license term.<sup>8/</sup> Further, even if an objective standard for "adequate" or reliable service is developed, there will be considerable difficulty in determining, and potential for reasonable dispute about, the exact number of persons within a licensee's service area. While 1990 census population figures are readily available for counties and incorporated areas, there is no published source of population data for areas which are served in part by a PCS facility. The draconian penalty of license forfeiture could not properly be imposed without absolute certainty that a licensee failed to serve the required percentage of the area's population.

8. Petitioners submit that a more appropriate and administratively feasible means of discouraging the warehousing of PCS frequencies is to borrow the successful model of the cellular fill-in period. Any area not served by a cellular licensee within five years after issuance of the initial construction permit is available to unserved area applicants. A five-year fill-in period for PCS may be unreasonably short, given the questions which presently abound concerning the availability of PCS equipment. However, the concept that the area left unserved is the area for which a license is forfeited is more equitable to the licensee and enforceable by the Commission than the current population

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<sup>8/</sup> The Second R&O states that licensees will be allowed "...to individually determine an appropriate field strength for reliable service in the PCS system." (fn. 106 which refers also to fn. 130)

coverage requirement.<sup>2/</sup>

9. The Commission should permit the licensee of a partitioned area to construct PCS facilities and retain the license for its own area even if the licensee in another partitioned area of the same MTA or BTA fails to meet construction requirements. Any penalty of license forfeiture should be imposed only upon the responsible party.

10. The current market-wide coverage requirements for PCS do not foster the Commission's goal of disseminating PCS as widely as possible. In order to meet the current market population-based coverage requirements, PCS licensees have an incentive to first provide service to areas with the greatest population density within the market. This would result in sparsely populated, rural areas lagging behind in receiving PCS service. Such a result can be averted if any population or area coverage requirements conform to partitioned market areas, rather than to the market area as a whole.

### **III. The Ownership Attribution Standard For Cellular Licensees Is Unduly Restrictive**

11. In the Second R&O, the Commission acknowledged the valuable role that cellular entities can play in the early development of PCS. For that reason, it permitted cellular

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<sup>2/</sup> By changing from population coverage to area coverage in order to discourage warehousing of PCS frequencies, the Commission could avoid the possibility that partitioning plans might be motivated by an intention to avoid a license forfeiture, assuming that the Commission properly does not hold the licensee of a partitioned area responsible for the construction (or lack thereof) by another licensee in the same MTA or BTA.

licensees to seek PCS licenses outside of their service areas without restriction. However, based on concerns of potential anti-competitive behavior by incumbent cellular owners, the Commission limited entities with a 20 per cent or greater interest in a cellular system to 10 Mhz of PCS spectrum in any BTA or MTA where the cellular system covers 10 per cent or more of the BTA or MTA population.<sup>10/</sup> Petitioners submit that the current ownership attribution standard, with the population obstacle, unnecessarily restricts entities with passive interests in cellular systems from participating in PCS in their areas in a meaningful way. They respectfully urge the Commission (1) to revise the ownership attribution level to one based upon control of a cellular system in the same service area, and (2) to increase the population limit to 20 per cent. This standard would satisfy the Commission's objective of fostering PCS without undermining competition in the wireless communications marketplace, and would therefore better serve the public interest.

12. The purpose of the ownership attribution standard, according to the Commission, is to prevent incumbent cellular operators from exerting "undue market power" in their service areas. (Second R&O at para. 107) The Commission proposes to accomplish this by limiting participation in PCS by entities with a non-controlling interest in a cellular system without any evidence that they could use that interest to subvert

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<sup>10/</sup> Second R&O at para. 107.

competition in the PCS market. Rather, it appears that the basis for the Commission's restrictive ownership test is administrative convenience. (Second R&O at para. 108)

13. It stands to reason that only an entity with a controlling interest in a cellular license in its service area, serving a far more significant portion of the population than 10 per cent, could potentially manipulate the PCS market within that service area. Therefore, Petitioners urge the Commission to adopt a threshold based upon control, rather than an arbitrary percentage interest in a cellular licensee and to change the 10 percent population overlap standard to an overlap standard of 20 percent or more of the PCS license area population. Such a change would satisfy the Commission's dual objectives of promoting PCS and preventing potentially anti-competitive behavior.

14. Ironically, a low threshold ownership interest will prevent entities with the experience and the infrastructure in place from using both to introduce PCS into the market as quickly as possible. Thus, the current threshold will thwart deployment of PCS to as much of the public as possible as quickly as possible, rather than facilitate service.

#### **IV. Conclusion**

15. In order to promote the availability of PCS in urban and rural areas alike, the Commission should provide for partitioning of MTAs and BTAs into separately licensed areas. Also, the present construction requirements for broadband PCS should be revised to eliminate vague and difficult to enforce

population coverage terms. If any construction requirements are retained they should apply to each licensee in a market. Basic fairness dictates that licensees should be subject to a forfeiture of license rights only for that portion of their area which is not served in a reasonable period of time.

16. The current ownership attribution standard unduly restricts entities with minority interests in cellular operations from developing PCS in their service areas. It is in the public interest to allow cellular operators to participate without restriction in PCS in their service area, so long as they do not hold a controlling interest in the cellular system which could lead to anti-competitive practices. A reasonable definition of control is actual control of a cellular system licensee which serves 20 percent or more of the PCS license area population.

Respectfully submitted,

ALLIANCE OF RURAL AREA TELEPHONE  
AND CELLULAR SERVICE PROVIDERS

By: 

David L. Nace  
Marci E. Greenstein  
Pamela L. Gist

Its Attorneys

Lukas, McGowan, Nace  
& Gutierrez, Chartered  
1819 H Street, N.W.  
Seventh Floor  
Washington, D.C. 20006  
(202) 857-3500

December 8, 1993



**ALLIANCE OF RURAL AREA TELEPHONE AND CELLULAR  
SERVICE PROVIDERS**

BMCT, L.P. (Oregon & Washington)

Ben Lomand Rural Telephone Cooperative, Inc. (Tennessee)

Bledsoe Telephone Cooperative (Tennessee)

Bristol Bay Telephone Cooperative, Inc. (Alaska)

Citizens Telephone Corporation (Indiana)

Curtis Telephone Company (Nebraska)

ETEX Telephone Coop., Inc. (Texas)

Filer Mutual Telephone Co. (Idaho)

Granite State Telephone, Inc. (New Hampshire)

New Paris Telephone, Inc. (Indiana)

North Carolina RSA 3 Cellular Telephone Company  
d/b/a/ Carolina West Cellular (North Carolina)

Northwestern Indiana Telephone Company, Inc. (Indiana)

Peoples Telephone Cooperative, Inc. (Texas)

Pioneer Telephone Association Incorporated (Kansas)

Rural Telephone Company (Idaho)

S & A Telephone Company, Inc. (Kansas)  
(A subsidiary of Mid-South Telecommunications  
Company, Inc.)

Skyline Telephone Membership Corporation (North Carolina)

St. Joseph Telephone & Telegraph Company (Florida)

Stanton Telephone Company (Nebraska)

Sycamore Telephone Company (Ohio)

Thacker-Grigsby Telephone Co., Inc. (Kentucky)

Union Telephone Company (Colorado & Wyoming)

Yadkin Valley Telephone Membership Corporation  
(North Carolina)

Yorkville Telephone Cooperative, Inc. (Tennessee)

**CERTIFICATE OF SERVICE**

I, Loren Bradon, a secretary in the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, hereby certify that I have on this 8th day of December 1993, sent via First Class U.S. Mail, a copy of the foregoing PETITION FOR RECONSIDERATION to the persons named below:

  
Loren Bradon

Daniel L. Bart, Esq.  
1859 M Street, N.W., Suite 1200  
Washington, D.C. 20036  
Attorney for GTE Service Corporation

G. Todd Hardy, Esq.  
Hardy & Ellison  
9306 Old Keene Mill Road, Suite 100  
Burke, VA 22105  
Attorney for PCN America, Inc.

Office Of Advocacy  
409 Third St., S.W., 7th Floor  
Washington, D.C. 20416

Contel Corporation  
500 Northpark Town Center  
1100 Abernathy Road, Suite 300  
Atlanta, GA 30328

Technologies Strategies and Solutions Associates  
6116 Brassie Way  
Redding, CA 96003

George Y. Wheeler, Esq.  
Koteen & Naftalin  
1150 Connecticut Ave., N.W.  
Washington, D.C. 20036  
Attorney for American Portable Telecommunications, Inc.

Kevin J. Kelley, Vice President  
External Affairs  
QUALCOMM Incorporated  
1233 20th Street, N.W., Suite 202  
Washington, D.C. 20036

National Cable Television Association  
1724 Massachusetts Avenue, N.W.  
Washington, D.C. 20036-1969

Citizens Utilities Company of California  
1035 Placer Street  
Redding, CA 96001

Electric Lightwave, Inc.  
P.O. Box 4959  
Vancouver, WA 98662

Stephen G. Kraskin, Esq.  
Caressa D. Bennet, Esq.  
2120 L Street, N.W., Suite 810  
Washington, D.C. 20037

Attorneys for Paramount Wireless Limited Partnership,  
Tri-Star Communications,  
Adams Telecom, Inc.,  
Columbia Wireless Limited Partnership,  
East Ascension Telephone Company, Inc.,  
Middle Georgia Personal Communications, Inc.,  
Reserve Telephone Company, Inc., and  
San Marcos Telephone Company, Inc.

William J. Franklin, Esq.  
WJF Chartered  
1919 Pennsylvania Ave., N.W., Suite 300  
Washington, D.C. 20006

Attorney for Wireless Communications Services, Inc.

John W. Hunter, Esq.  
McNair Law Firm, P.A.  
1155 15th Street, N.W.  
Washington, D.C. 20005  
Attorney for Rock Hill Telephone Company

Frederick M. Joyce, Esq.  
Christine McLaughlin, Esq.  
Joyce & Jacobs  
2500 M Street, N.W., 8th Floor  
Washington, D.C. 20037  
Attorneys for LDH International, Inc.

James F. Ireland, Esq.  
Cole, Raywid & Braverman  
1919 Pennsylvania Ave., N.W.  
Washington, D.C. 20006-3458  
Attorney for TeleCable Corporation

J. Bradford Shirley, Esq.  
4640 S.W. Macadam, Suite 270  
Portland, OR 97201

Paul J. Sinderbrand, Esq.  
Dawn G. Alexander, Esq.  
Keck, Mahin & Cate  
1201 New York Avenue, N.W., Penthouse  
Washington, D.C. 20005-3919  
Attorneys for Gateway Technologies, Inc.,  
Snowcap Communications, Inc.,  
Prospective Communications, Inc.,  
2001 Technologies, Inc. and  
PCS Network, Inc.

Gerald S. McGowan, Esq.  
Lukas, McGowan, Nace & Gutierrez  
1819 H Street, N.W., 7th Floor  
Washington, D.C. 20006  
Attorney for Globus Communications Inc.

Harold Mordkofsky, Esq.  
Blooston, Mordkofsky, Jackson & Dickens  
2120 L Street, N.W.  
Washington, D.C. 20037  
Attorney for Advanced Tel., Inc.

Kenneth E. Hardman, Esq.  
1255 23rd Street, N.W., Suite 800  
Washington, D.C. 20037-1170  
Attorney for Reserve Communications and Computer Corp.

Organization for the Protection and Advancement  
of Small Telephone Companies (OPASTCO)  
21 Dupont Circle, N.W., Suite 700  
Washington, D.C. 20036

Terry L. Hoke, P.E.  
Telecom Projects Manager  
POWER Engineers, Inc.  
P.O. Box 1066  
Hailey, ID 83333